In The

Supreme Court of the United States

October Term, 1977

77-4861

No. .....

WILLIAM C. McCORKLE, JR., ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, ROBERT E. HAMPTON, AND JAMES T. LYNN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on July 26, 1977.

I.

OPINIONS BELOW

The Order of the District Court for the Eastern District of Virginia, Alexandria Division, dismissing this action is not reported but is attached as Appendix A.

The opinion of the Court of Appeals for the Fourth Circuit is not reported yet. It is attached as Appendix B.

II.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on July 26, 1977. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

III.

QUESTIONS PRESENTED

1. Whether a single house of Congress may constitutionally veto presidential action taken under powers lawfully delegated to him by the Congress.

2. Whether a statute which contains a constitutional and an unconstitutional alternate must fail in its entirety if only the unconstitutional alternate is struck down.

3. Whether a pay schedule which freezes salaries of more senior government employees while allowing increases to those with less seniority creates an invidious discrimination which violates the Equal Protection clause of Amendment V to the United States Constitution.

Constitutional and Statutory Provisions

1. CONSTITUTIONAL PROVISIONS:

Article I, Section 1

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 7

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.
>
> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be com-

pelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. STATUTORY PROVISIONS:

Postal Revenue and Salary Act of 1967, 2 USC § 351, *et seq.*

§ 351. Establishment of Commission.

There is hereby established a commission to be known as the Commission on Executive, Legislative, and Judicial Salaries (hereinafter referred to as the "Commission"). (Pub. L. 90-206, title II, § 225(a), Dec. 16, 1967, 81 Stat. 642.)

* * *

§ 357. Report to the President.

The Commission shall submit to the President a report of the results of each review conducted by the Commission of the offices and positions within the purview of subparagraphs (A), (B), (C), and (D) of section 356 of this title, together with its recommendations. Each such report shall be submitted on such date as the President may designate but not later than January 1 next following the close of the fiscal year in which the review is conducted by the Commission. (Pub. L. 90-206, title II, § 225(g), Dec. 16, 1967, 81 Stat. 644.)

* * *

§ 358. Recommendations of the President to Congress.

The President shall include, in the budget next transmitted by him to the Congress after the date of the submission of the report and recommendations of the Commission under section 357 of this title, his recommendations with respect to the exact rates of pay which he deems advisable, for those offices and positions within the purview of subparagraphs (A), (B), (C), and (D) of section 356 of this title. As used in this Section, the term "budget" means the budget referred to in section 11 of Title 31. (Pub. L. 90-206, title II, § 225(h), Dec. 16, 1967, 81 Stat. 644.)

* * *

§ 359. Same; effective date.

(1) Except as provided in paragraph (2) of this section, all or part (as the case may be) of the recommendations of the President transmitted to the Congress in the budget under section 358 of this title shall become effective at the beginning of the first pay period which begins after the thirtieth day following the transmittal of such recommendations in the budget; but only to the extent that, between the date of transmittal of such recommendations in the budget and the beginning of such first pay period—

(A) there has not been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations,

(B) neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendations, or

(C) both.

(2) Any part of the recommendations of the President may, in accordance with express provisions of such recommendations, be made operative on a date later than the date on which such recommendations otherwise are to take effect. (Pub. L. 90-206, title II, § 225(i), Dec. 16, 1967, 81 Stat. 644.)

Federal Pay Comparability Act of 1970, 5 USC § 5301, *et seq.*

§ 5301. Policy.

(a) It is the policy of Congress that Federal pay fixing for employees under statutory pay systems be based on the principles that—

(1) there be equal pay for substantially equal work;

(2) pay distinctions be maintained in keeping with work and performance distinctions;

(3) Federal pay rates be comparable with private enterprise pay rates for the same levels of work; and

(4) pay levels for the statutory pay systems be interrelated.

(b) The pay rates of each statutory pay system shall be fixed and adjusted in accordance with the principles under subsection (a) of this section and the provisions of sections 5305, 5306, and 5308 of this title.

* * *

§ 5308. Pay limitation.

Pay may not be paid, by reason of any provision of this subchapter, at a rate in excess of the rate of basic pay for level V of the Executive Schedule.

Postal Service and Federal Employees Salary Act of 1962, 10 USC § 1581.

§ 1581. Appointment: professional and scientific services.

(a) The Secretary of Defense may establish not more than five hundred thirty civilian positions in the Department of Defense to carry out research and development relating to the national defense, military medicine, and other activities of the Department of Defense that require the services of specially qualified scientists or professional personnel.

(b) Subject to the Civil Service Commission's approval as to rates, the Secretary may fix the compensa-

tion for positions established under subsection (a). However, the per annum compensation may not be less than the minimum rate of grade 16 of the General Schedule of the Classification Act of 1949, as amended, nor more than the highest rate of grade 18 of the General Schedule of such Act.

(c) Positions established under subsection (a) are in the classified civil service of the United States. However, if the Civil Service Commission or a person designated by it approves a proposed appointee's qualifications, no competitive examination may be required.

IV.

STATEMENT OF THE CASE

This case involves the constitutionality of the one-House veto as it is applied to the pay of certain federal employees. It also involves arguably unconstitutional statutory discrimination against those same employees.

Petitioner William C. McCorkle, Jr., a civilian employed by the Department of the Army, brought this action on behalf of himself and other similarly situated employees of the United States. The class petitioner represents consists of government employees in pay grades GS-15 through GS-18 and civilian employees of the Department of Defense in comparable pay grades. Petitioners seek injunctive relief and certain increases in salary denied them by the imposition of a ceiling on salaries set under the General Schedule and by the enactment of Senate Resolution 293 which vetoed a salary increase authorized by President Nixon.

A. Federal Pay Statutes

This case concerns the interrelationship among the three basic salary acts applicable to civilian federal employees,

the Federal Salary Reform Act of 1962, the Postal Revenue and Salary Act of 1967, and the Federal Pay Comparability Act of 1970.

The General Schedule was established in 1949 as the basic pay system for most federal employees. It contains 18 levels of pay scales determined by responsibility and qualification. Prior to 1962 pay rates for each grade were adjusted on an irregular basis by Congressional legislation.

Under the terms of 10 USC § 1581, the salaries of certain civilian employees of the Department of Defense, including Dr. McCorkle, are fixed by the Secretary of Defense within limits obtained from, and based upon, the General Schedule.

The Executive Schedule, established in 1964 by Congress, sets salaries for top-level federal employees, the so-called "supergrades."

In 1962 Congress passed the Federal Salary Reform Act, Pub. Law 87-793, Part II, 76 Stat. 841, mandating that federal salaries be brought in line with those paid for comparable work in the private sector. By this Act the President is directed to compare federal pay rates with those in the private sector and to recommend to Congress pay adjustments designed to achieve comparability. These recommendations were made in the form of legislative proposals to be enacted or rejected by Congress.

By enactment of the Postal Revenue and Salary Act of 1967, Pub. Law 90-206 codified as 2 USC § 351, *et seq.* (the Salary Act), Congress established the Commission on Executive, Legislative and Judicial Salaries which meets quadrennially to recommend appropriate pay scales to the President for certain high levels including the Executive Schedule. The President is not bound by the Commission's recommendations. Under § 359 the President transmits to Congress recommendations which automatically take effect

unless Congress enacts different rates of pay or either house of Congress enacts "legislation" disapproving all or part of the President's recommendations.

The Federal Pay Comparability Act of 1970, 5 USC § 5301, *et seq.* (FPCA), established a mechanism for setting federal pay scales comparable to private salaries whenever the President finds a substantial divergence between the two. Under that Act the President adjusts federal pay rates on the General Schedule (and thus salaries of civilians in the Department of Defense) to accord with private wage scales and reports these adjustments to Congress. Unless disapproved by Congress, the adjustments take effect in the applicable year.

Section 5308 of the FPCA provide that rates of pay under the General Schedule are subject to a ceiling as follows:

> Pay may not be paid, by reason of any provision of this subchapter, at a rate in excess of the rate of basic pay for level V of the Executive Schedule.

Since the President can adjust salaries on the Executive Schedule under 2 USC § 351, *et seq.*, the President ultimately controls the Executive Schedule and therefore the ceilings placed on the General Schedule by 5 USC § 5308.

B. The Discriminatory Effect of the Pay Acts on the Aggrieved Class

The petitioning class includes supergrade General Schedule employees and comparable employees of the Department of Defense whose salaries are fixed within parameters obtained from the General Schedule. At the end of 1973 the salaries of petitioners were frozen by 5 USC § 5308 at the basic rate for level V of the Executive Schedule, or $36,000.00. Had the annual recommendations made by the

President pursuant to the 1970 Pay Comparability Act gone into effect virtually all of petitioners would have been compensated at a rate in excess of $36,000.00.

On January 31, 1974, President Nixon submitted to Congress a recommendation that Executive Schedule salaries be increased by 7.5 percent per year over a three-year period. As the lowest level of the Executive Schedule rose, then the upper limit of petitioners' salaries would rise to that level. By Senate Resolution 293 enacted on March 6, 1974, the Senate disapproved the President's recommendations. The Senate thereby purported to cancel the three annual salary increases, and the lowest pay scale within the Executive Schedule remained frozen at the $36,000.00 level. Petitioners' salary increases already previously set by the action of the President pursuant to the Pay Comparability Act were cancelled as well.

On April 25, 1975, petitioners brought this class action in the United States District Court for the Eastern District of Virginia. The United States moved to dismiss for failure to state a justiciable cause of action. The motion of the United States to dismiss was granted on January 25, 1976, and an order was subsequently entered on March 16, 1976.

Petitioners appealed the dismissal to the Fourth Circuit. At the request of that court the parties twice filed supplemental briefs, first on December 30, 1976, and again on May 31, 1977. The court ultimately affirmed the District Court's dismissal.

V.

ARGUMENT

A. The "One-House Veto" Mechanism Employed with Increasing Frequency by the Congress of the United States is Unconstitutional; Its Invalidity Should be Decided by this Court Now.

The "one-house veto" is the antithesis of the normal legislative process. Instead of having legislation passed by Congress subject to presidential veto, it reverses the sequence. The President exercises powers delegated to him by Congress, but then one house has the right to disapprove presidential action. The President is then without recourse to disapprove that one house action.

In the past four decades the one-house veto has been employed by Congress on a number of occasions. First employed in 1932,[1] the device has "undergone a rapid expansion of new legislation"[2] until now some 295 separate provisions of 196 different acts of Congress employ some mechanism of Congressional control over executive action.[3]

Especially since 1970, the frequency with which Congress has enacted these review and consent provisions has steadily increased.[4] In the area of Congressional review of executive spending alone, Congress holds veto power in some thirteen areas, including the Departments of Defense, Agriculture,

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[1] Watson, "Congress Steps Out: A Look at Congressional Control of the Executive," 63 Cal. Law Rev. 983 (1975).

[2] 63 ABA News 915 (July, 1977).

[3] Norton, *Congressional Review, Deferral and Disapproval of Executive Actions: A Summary and An Inventory of Statutory Authority,* Page 1 (Library of Congress, Congressional Research Service, April 30, 1976).

[4] Stewart, "Constitutionality of a Legislative Veto," 13 Harvard Journal on Legislation 593 (1976).

Interior, Transportation, Treasury, Labor and Justice.[6] Examples of recent acts embodying the one-house veto are the Presidential Recordings and Materials Preservation Act, 44 USC § 2107 (Supp. 1976), the Federal Election Campaign Act amendments of 1974, 2 USC § 438(c) (Supp. 1976), and the Emergency Petroleum Allocation Act of 1973, 15 USC § 753(g)(2) (Supp. III 1973).

With the growing use of the one-house veto increasing challenges have come to the constitutional validity of the device. It is challenged both as a breach of separation of powers and as a short-circuiting of the bicameral legislature. *Atkins* v. *United States,* Nos. 41-76, 132-76, 357-76 (Ct. Cl. May 18, 1977), a case in which federal judges seek salary increases on alternate theories, is presently before this Court on a petition for a writ of certiorari. One of the issues in *Atkins*—the validity of 2 USC § 359(1)(B)—is the same as the issue in this case. The fact that the Court of Claims divided 4-3 on the issue of the constitutionality of § 359 (1)(B) is strong indication not only of the need for an authoritative judicial pronouncement on the issue but also of the strength of petitioner's position here.

This Court has granted certiorari in two recent cases involving the one-house veto provisions of the Federal Election Campaign Act, 2 USC § 438(c). The Court disposed of *Buckley* v. *Valeo,* 424 U.S. 1 (1976) on other grounds and declined to decide the constitutional issue. 424 U.S. 1, 140 n. 176. This Court affirmed the D. C. Circuit's dismissal of *Clark* v. *Valeo,* 45 U.S.L.W. 2349 (D.C. Cir. January 21, 1977). It held the action premature since Congress had not exercised its veto power. See *Clark* v. *Kimmitt,* 45 U.S.L.W. 3785-86 (U.S. June 6, 1977).

[6] Brief *amicus curiae* on behalf of Frank Thompson, Jr., in *Atkins* v. *United States,* Nos. 41-76, 132-76, 357-76 (Ct. Cl. May 18, 1977).

But this action is not premature. One house of Congress, the Senate, has vetoed presidential action. It has done so by mere resolution, not the "legislation" called for by § 359(1)(B), although one can be forgiven for wondering whether "legislation" by one house of Congress is not a contradiction in terms. The petitioners have been demonstrably and ascertainably damaged by that veto.

Pressler v. *Simon,* 428 F.Supp. 302 (D.D.C. 1976) also challenged the one-house veto in 2 USC § 359(1)(B) because the one-house veto impaired the strength and value of Congressman Pressler's vote as a member of the House of Representatives. The District Court found that Congressman Pressler did have standing to sue but concluded that the Salary Act did not violate the Constitution. That case was appealed to this Court on October 22, 1976. This Court vacated the decision of the lower court and remanded the case for further consideration in light of the 1977 amendments to the Salary Act which, among other things, removed the one-house veto provision from the Act. Thus it was not necessary for this Court to consider the constitutionality of the one-house veto. *Pressler* v. *Blumenthal,* 52 L.Ed.2d 216 (1977).

Most recently an alien has challenged the constitutionality of the provision of the Immigration and Nationality Act, 8 USC § 1254(c)(2), by which the House of Representatives countermanded an order of the Immigration Service which had suspended the alien's deportation. See *Chadha* v. *Immigration and Naturalization Service,* No. 77-1702 (9th Cir., appeal docketed March 24, 1977). *Chadha* may soon be before this Court on a petition for certiorari.

This surge of challenges to the one-house veto is not surprising. Use of the device has engendered contention within the government for decades. Every president from Herbert Hoover through Gerald Ford has argued against the consti-

tutionality of the one-house veto.[6] Constitutional commentators and Senators and Representatives have argued that these provisions abridge constitutional protections.[7] While this very case was pending in the Fourth Circuit the United States, after terming the type of one-house veto here challenged "less egregious than others," flatly conceded its invalidity as employed in the Salary Act:

> Accordingly, it is clear from this analysis that the Department views legislative veto procedures which require executive action, yet permit the exercise of a congressional veto power thereon, as unconstitutional. Such is the principal vice of the legislative veto procedure contained in Section 225 of the Salary Act. Under the statute, the president is required by Section 358 to submit, on a quadrennial basis, his recommendations for the adjustment of federal, executive, legislative, and judicial salaries. While he retains the option to recommend no increase or decrease, such a recommendation, upon the foundation of existing salary levels, and an existing salary adjustment program, is no less a substantive recommendation. Thus, the President is forced to act, and does not have the option to withhold a recommendation altogether. *Cf. National Treasury Employees Union* v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974).
>
> This obligation imposed upon the President to administer an ongoing program, and to submit quadrennial salary adjustment recommendations, in conjunction with the legislative veto power contained in the statute, permits the Congress to intrude upon the constitutionally preserved policy-making function of the executive. As discussed in the Attorney General's opinion, the President is required to act, and he must act in a manner acceptable to Congress if he is to be effective at all. The recommendation of no increase whatsoever, or no salary restructure, is not a realistic one.
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> * * *
>
> Analysis of § 359(1)(B) in the context of the Attorney General's January 31 opinion reveals, therefore, a consistency in the Department's view that § 359(1)(B) operates unconstitutionally to dilute the position of the Executive Branch in the Article I legislative process. Second Supplemental Brief for Appellees, p. 4, *et seq*.

[6] Watson, "Congress Steps Out," above, fn. 1.

[7] See, *e.g.*, 84 Cong. Rec. 6504-07 (1941)—Senators Adams and Taft; 97 Cong. Rec. 5443 (1951)—Representative Patman; 100 Cong. Rec. 5095 (1954)—Senator Dirksen.

This concession by the Department of Justice, which is charged with defending the laws, highlights the uncertainties surrounding the one-house veto and the need for clarification.

A decision that the one-house veto here challenged is unconstitutional is not moot or advisory. It would directly affect a class of some 15,000 government workers whose salaries have not only been frozen while the salaries of other government workers have steadily increased but have in effect been eroded by inflation, all by virtue of Senate Resolution 293. Prospective salary increases for members of this class run as high as $7,000.00 annually with even more substantial retroactive and retirement benefits.

The United States will also benefit. Equipped with higher pay scales, the Administration will attract and retain professionals of the high caliber needed to govern effectively. By removing the unconstitutional bars to salary increases, this Court will effectuate the policy of the Federal Salary Reform Act—comparable pay for comparable work.

Where one house of Congress cancels an otherwise effective exercise of presidential power, the result violates the bicameral principle of Article I, Section 1 of the Constitu-

tion of the United States. The power given to the President by Sections 359 and 360, while characterized as a recommendation, is clearly a power to act. Under § 359 "the recommendations of the President . . . shall become effective . . ." unless properly repealed by Congressional action. In 1969, "recommendations" of the President did take effect; again in 1975, a "recommendation" created pay increases.

Section 360 is more emphatic. It states that "the recommendations of the President transmitted to the Congress . . . shall be held and considered to modify, supersede, or render inapplicable, as the case may be, to the extent inconsistent therewith . . ." all prior laws and effective "recommendations." This is clearly more than the power to advise, a power which the President already holds and can exercise at will. That power to advise is not the same as the quadrennial exercise granted under the Act.

The debates over the Act, revealing controversy over what some Congressmen considered an abdication, confirm the delegation of pay-setting power to the President. Representative Udall, the floor manager for the bill in the House, commented:

> Complaints are made here about a delegation of power. Ordinarily, I object to the delegation of congressional power. That is bad. There are exceptions to every rule, and this is the case where the delegation of power is good.
>
> * * *
>
> This is a delegation of congressional power to fix the salaries of federal employees . . . . 133 Cong. Rec. 28643 (1967).

It is apparent, therefore, that the President's "recommendation" is not a recommendation at all, but a legislative act.

There is no constitutional difficulty in recognizing this power for what it is, since Congress retains control to prevent abuse of the power by appropriate statutes—either repealing the power or avoiding a particular use of it by the perfectly constitutional method prescribed in § 359(1)(A) of a statute enacted by both houses—and by control of the appropriation power. Senate Resolution 293, purporting to repeal the exercise of power delegated to the president, was ineffective because it violated Article I, Section 1 of the Constitution.

Article I, Section 1 of the Constitution states:

> SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

The meaning of this passage is clear: the Constitution requires affirmative participation by both houses to pass legislation.

No suggestion has been made, or could be, that repeal of a regularly enacted law is, by virtue of its negative effect, any the less "legislation." Neither of the courts below has suggested that Congress lacked the power to delegate to the President the authority to fix pay schedules. So it follows that when President Nixon exercised power properly delegated to him by Congress in his pay schedule recommendations of 1974, the concerted action of both houses of Congress, subject to presidential veto, was required to repeal the resulting salary adjustments.

By adoption of Senate Resolution 293, the Senate alone purported to reject the President's recommendations in accordance with § 359(1)(B). This was a clear violation of the bicameral spirit espoused by the framers of the Constitution. It in effect permitted one house of Congress to set federal pay scales after both houses had delegated that authority to the President. Thus, the effect of § 359(1)(B),

authorizing a single house of Congress to repeal legislation validly enacted, can only be described as a violation of the letter and the spirit of Article I, Section 1 of the Constitution.

The Constitution is composed of a delicate combination of checks and balances. One of the most important is Article I, Section 7, which subjects all laws passed by Congress to presidential veto. Where one house of Congress cancels all or part of an otherwise effective exercise of presidential power, it abrogates the veto power secured to the President by Article I, Section 7, of the Constitution of the United States. Any scheme which effectively deprives the President of that veto power contravenes the Constitution.

If the President's salary schedule were to establish a ten percent pay increase for all jobs, and the Congress were to approve by silence, the President needs no veto. If Congress were to seek to modify or reject the President's salary schedule by enacting appropriate legislation under § 359 (1)(A), the President can veto that legislation if he disagrees with it. But where, as here, one house vetoes the salary schedule under § 359(1)(B), that house by mere resolution effectively enacts repeal legislation which is not subject to any check by the President's veto power.

An even more disturbing illustration of the danger of removing the President's veto power may be demonstrated. Section 359(1)(B) permits one house to reject the President's salary schedule in part as well as completely. Suppose the Senate, rather than vetoing the President's salary schedule completely, were to veto the raise only as to the pay of judges, permitting raises for Congressmen, cabinet members and others on the Executive Level schedule to take effect. The result is dramatically changed from the President's original salary schedule. Under those circumstances it might be the President's will that no salary increases take

effect. Yet if § 359(1)(B) is constitutional, the President has lost his right to veto such a result.

The one-house veto-in-part has been singled out by Professor Robert G. Dixon, Jr., of Washington University School of Law as the one most glaring flaw in the Salary Act. Speaking before the annual meeting of the Association of American Law Schools on December 29, 1976, Professor Dixon remarked as follows:

> *Fourth,* it is critical to the safeguarding of the President's role in this context that the Congress simply react 'yes' or 'no' to his proposal. If Congress has a power to modify, *i.e.,* negate part of the President's proposal but not all of it, with no opportunity for the President to say whether he would agree to severability, then his constitutional parity with Congress in lawmaking is undermined.
>
> Applying these suggested principles to the present situation, it would seem that even if the one-house veto procedure may be [sic] pass muster under a functional interpretation of separation of powers for a limited category of acts . . . inclusion of any modification power along with the one-house veto is clearly unconstitutional. The Salary Act of 1967 does contain just such a power to negate, 'in whole or in part.' Text at 19.

Any legislative device which permits one branch of government to have unchecked power, even in the limited circumstances which exist here, cannot be tolerated even though efficiency may be diminished by striking down that device.

> Rather, liberty is to be preserved and class domination checked by an organization which may delay the accomplishment by any group of its will, *even at the expense of efficiency.* Against the unprecedented power of relatively popular legislatures the Fathers set strong executives, both in the states and the nation. Sharp,

> The Classical American Doctrine of "The Separation of Powers," 2 University of Chicago Law Review 385 (1935). [Emphasis added.]

Any legislative device which tilts the balance of that organization cannot withstand constitutional scrutiny. Section 359(1)(B), which creates an imbalance by depriving the executive of the veto power, is constitutionally invalid.

B. Section 359(1)(B) is Severable from the Salary Act.

The Fourth Circuit avoided the question of the invalidity of § 359(1)(B) by holding that section inseverable from the remaining provisions of the Salary Act. That court concluded that even if § 359(1)(B) were unconstitutional the petitioners could not recover unless that section was severable from the Salary Act. The Fourth Circuit then reviewed a portion of the legislative history of the Act. It speculated that because some Congressmen during the debates expressed concern about the power delegated to the President and were assured that one house could veto presidential action "with five minutes of debate" it followed inevitably that § 359(1)(B) was inseverable.

The Fourth Circuit correctly stated the standard for determining severability:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. *Champlin Refining Co.* v. *Corporation Commission,* 286 U.S. 210, 234 (1932).

In *United States* v. *Jackson,* 390 U.S. 570, 585 (1968), this Court reaffirmed the test of severability which it had set out in *Champlin Rfg. Co.* v. *Commission,* 286 U.S. 210, 234 (1932):

> The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

This test affirmatively places the burden upon the party who is claiming that the invalid provision is not severable to show clearly that the legislature would not have enacted the remaining portions of the statute. See *Moore* v. *Fowinkle,* 512 F.2d 629, 632 (6th Cir. 1975):

> When a statute contains one or more unconstitutional provisions, the obnoxious provisions will be eliminated and the statute sustained as to the rest, unless the invalid provisions are deemed so essential, and are so interwoven with others, that it cannot reasonably be presumed that the legislature intended the statute to operate otherwise than as a whole.

See also, *Carter* v. *Gallagher,* 337 F.Supp. 626, 628 (D. Minn. 1971). That standard is not met here. In fact it is quite clear, in retrospect, that Congress would have passed the Act intact even without the invalid section. Just this year Congress amended § 359(1)(B) to provide that the President's recommendations would become effective only if both houses approve, P.L. 95-19, April 12, 1977. If Congress were really concerned about preserving the concept that either house should have the right to reject a pay increase, a concern postulated by the Fourth Circuit, it surely would not have enacted a new procedure calling upon both houses to act.

The Salary Act provides a system of pay adjustment which balances ease of administration in the Executive branch against retention of ultimate control in the Congress.

The controls retained by Congress were three: control by both houses through enactment of repealing or overriding statutes under § 359(1)(A); control by either house through exercise of veto under § 359(1)(B); and control by either house through refusal to appropriate funds to carry out salary increases.

This is a redundancy of controls. Enactment of repealing or overriding statutes pursuant to § 359(1)(A) is subject to presidential veto and is constitutional. Congress surrenders no ultimate power if the check provided by § 359(1)(B) is withdrawn. Accordingly, that control is not "necessary" and is severable from the remainder of the Act.

In the Court of Claims decision in *Atkins,* three of seven judges specifically wrote that § 359(1)(B) was severable from the remainder of the Act. As succinctly stated in the petition for certiorari in that case,

> The remaining four judges held that Clause B was constitutional and did not discuss severability. Since a holding of non-severability would have allowed the judges to avoid the constitutional question, the fact that they reached and decided that question may reflect a belief that Clause B is severable. Cf. *Ashwander* v. *TVA,* 297 U.S. 288 (1936). *Atkins* v. *United States of America,* No. 77-214, Petition for Writ of Certiorari, p. 17.

The conclusion is logical, and totally in keeping with the Act and its legislative history, that Congress would not have intended to discard the entire Act simply because an alternative control proved invalid.

As the alternative ground for avoiding the issue of constitutionality, the Fourth Circuit stated:

> We also conclude that McCorkle is not entitled to a judgment declaring whether Section 359(1)(B) is constitutional . . . moreover, while this appeal was pending, Congress amended Section 359(1)(B) to provide that the President's recommendations shall become effective only if both houses of Congress approve. Because the statute no longer provides for a one-house veto, a declaratory judgment concerning the constitutionality of this legislative check on executive action would not affect the procedure used to determine McCorkle's future pay. *McCorkle* v. *United States,* No. 76-1479, slip op. at 11, 12 (4th Cir. July 26, 1977).

Such reasoning ignores the need for this Court to consider the important constitutional issues presented by this case. Petitioners seek a declaration of the effect, if any, of Senate Resolution 293 adopted in 1974 pursuant to that section. If the resolution were ineffective to veto presidential action, then the petitioning class is entitled to the annual salary increases which the resolution purported to cancel. The fact that the mechanism of § 359(1)(B) may have been altered after the resolution has no effect on the rights of petitioners to recover the additional pay they would have received from 1974 to 1977 had Senate Resolution 293 not perpetuated the frozen status of their compensation.

Nor does President Carter's new pay schedule, which raises salaries under the Executive Schedule effective March, 1977, render this case moot. That increase raised the basic pay of level V to $47,500.00, but by the terms of Executive Order 11941, 41 Fed. Reg. 43889 (1976), the basic pay of individuals at varying steps of GS level 16 and above would otherwise rise as high as $54,410.00. Accordingly the ceiling set by § 5308, together with Senate Resolution 293, continues to deprive the petitioning class of higher pay unconstitutionally.

This Court should grant certiorari in order to give this important constitutional question the consideration it did not receive in the Fourth Circuit and finally to rule on the validity of the one-house veto.

C. The Pay Schedule Creates an Invidious Discrimination in Violation of the Fifth Amendment to the United States Constitution.

This case presents a second constitutional issue. The salary freeze imposed by § 5308 upon upper level General Schedule employees violates the equal protection guarantee of the Fifth Amendment to the Constitution.

Section 5308 discriminates beween employees with salaries below the basic rates of level V, and petitioners whose adjusted rates exceed, and are therefore frozen at, the level V rate. While other General Schedule employees receive raises to offset inflation, the plaintiffs suffer an erosion of purchasing power. In addition to cost-of-living increases, petitioners are denied increases based upon promotions, merit, and length of service which other General Schedule employees continue to receive.

Dr. McCorkle has never contended that he represents a constitutionally suspect class. The test therefore is that laid down by this Court in *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966): does the discrimination bear a rational relationship to a permissible legislative purpose? To put it more pertinently, is there any rational basis for denying petitioners the salary increases routinely granted other government employees?

The burden of showing a rational basis for the discrimination rests on the United States, *Dandridge* v. *Williams*, 397 U.S. 471 (1969). The United States has offered three "rational bases" that the discrimination against petitioners was permissible. First the United States argued that Congress intended to set a limit on federal expenditures, which is reasonably accomplished by placing ceilings on federal salaries. This misses the point. It is not the freezing of salaries, but the freezing of some salaries, which the petitioner contests. There is no rational connection between cutting expenditures and the discrimination involved in denying salary increases only to petitioners.

The same reasoning applies to the contention of the United States that the discrimination is rationally related to a policy recognizing and rewarding the higher level of responsibility discharged by those on the Executive Schedule. While there may be a reason to freeze all General Schedule salaries, it is impermissible to freeze some salaries but not others.

Finally the United States contends that the system contemplated by the various salary-scale acts is designed to eliminate the sporadic nature of earlier pay-setting processes. This argument fails. The statutory mechanism contributes to the very process it seeks to correct by insuring that upper-level General Schedule employees receive only sporadic pay review. This result contradicts any rational relationship.

The Fourth Circuit, with little formal discussion of this point, simply concluded that § 5308 justifiably furthered legitimate purposes identified by Congress. But that is no more than an erroneous conclusion of law. The judgment of this Court is necessary to correct a clearly erroneous finding by the Circuit Court that the discrimination bears a rational relationship to a permissible legislative purpose, and to restore to petitioners the benefits denied them by that discrimination.

VI.

CONCLUSION

Debates on the constitutionality of the one-house veto will not abate because one court, the Court of Claims, has ruled 4-3 in favor of its constitutionality and another court, the Fourth Circuit, with only two judges ruling, has avoided passing on its constitutionality by unwarranted applications of the severability and mootness doctrines. Those two courts have decided an important question of federal law which has not been, but should be, decided by this Court. Rule 19(b), Rules of the Supreme Court.

This case presents the ideal opportunity for this Court to speak on an extremely questionable legislative practice which can only proliferate if not halted now. The consequences of a declaration of unconstitutionality at this time in this litigation are not severe. They involve only pay adjustments not greatly different in concept, though greater in amount, from those ordered in *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

If the constitutionality of the one-house veto is not decided now, it will surely be before this Court in another instance. That instance may not afford this Court the opportunity to speak in considered terms and in a manner which will do no violence to the principle of judicial restraint while upholding the principle of separation of powers. One cannot be so sanguine about another challenge to the one-house veto at another time.

Additionally the unconstitutional discrimination practiced against high-level federal employees by the operation of 5 USC § 5308 can be remedied with an explanation as to what this Court's opinion in *Dandridge* v. *Williams* means where the pay of federal employees is involved.

For these reasons we respectfully urge that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this matter.

Respectfully submitted,

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CERTIFICATE

I certify that I have mailed a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to James R. Hubbard, Esquire, Assistant United States Attorney, 117 S. Washington Street, Alexandria, Virginia 22314, this 28th day of September, 1977.

Lewis T. Booker

APPENDIX

APPENDIX A

In The
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

William C. McCorkle, Jr., et al., Plaintiffs, v. United States of America Robert E. Hampton, Chairman U. S. Civil Service Commission, and James T. Lynn, Director, Office of Management and Budget, Defendants.	Civil Action No. 317-75-A

ORDER

Upon consideration of the Motion to Dismiss filed by defendants the United States of America, Robert E. Hampton, and James T. Lynn, the briefs submitted by the parties, and the arguments of counsel, and

It appearing to the Court that a rational basis exists for the ceiling set forth in 5 U.S.C. § 5308 upon salaries that may be paid under the General Schedule and pay systems linked to it, see Dandridge v. Williams, 397 U.S. 471 (1969), and

It further appearing to the Court that federal pay setting, as accomplished under the provisions of 2 U.S.C. §§ 351-359, is an inappropriate area for judicial intervention, and that accordingly the issue raised under Count II of the Plaintiffs' complaint is nonjusticiable, and further for the reasons pronounced in open court, it is hereby

ORDERED, that the complaint is hereby dismissed.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia

Date: 3-16-

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1479

William C. McCorkle, Jr., on behalf of himself and all others similarly situated,

Appellant,

v.

The United States, Robert E. Hampton, Chairman, U.S. Civil Service Commission, James T. Lynn, Director, Office of Management & Budget,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued December 7, 1976 Decided July 26, 1977

Before Tom C. Clark,* Associate Justice, retired, sitting by designation, and Butzner and Widener, Circuit Judges

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Lewis T. Booker (Rand A. Mirante, Johnnie M. Walters, Hunton and Williams on brief) for appellants; James R. Hubbard, Assistant United States Attorney (William B. Cummings, United States Attorney on brief) for appellees.

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* Mr. Justice Clark died before this opinion was prepared.

BUTZNER, Circuit Judge:

William C. McCorkle, on behalf of federal government employees whose salaries are determined by the pay rates for grades 15 to 18 of the General Schedule, appeals the judgment of the district court upholding the constitutionality of § 3(a) of the Federal Pay Comparability Act of 1970 [5 U.S.C. § 5308] and § 225(i)(1)(B) of the Federal Salary Act of 1967 [2 U.S.C. § 359(1)(B)]. McCorkle contends that limiting the pay of General Schedule employees to an amount no higher than the salaries of Executive Schedule employees denies his class equal protection of the law in violation of the due process clause of the fifth amendment. He also contends that authorizing one house of Congress to veto the President's recommendations for Executive Schedule salaries is prohibited by the constitutional provisions for bicameral legislation, the presidential veto, and the separation of powers. He seeks a declaratory judgment that 5 U.S.C. § 5308 and 2 U.S.C. § 359(1)(B) are unconstitutional and that he and each member of his class are entitled to recover damages. For reasons that differ in some respects from those assigned by the district court, we affirm the dismissal of McCorkle's complaint.

I.

The General Schedule establishes the basic pay system for most federal civilian, white collar employees. It contains 18 grades based upon degrees of responsibility and qualification. The Federal Pay Comparability Act authorizes the President to adjust salaries annually in accordance with the congressional policy set forth in §§ 5301[1] and 5308.

[1] 5 U.S.C. § 5301 provides in part:

> (a) It is the policy of Congress that Federal pay fixing for employees under statutory pay systems be based on the principles that—
>
> (1) there be equal pay for substantially equal work;

The target of McCorkle's complaint is § 5308 which provides:

> Pay may not be paid, by reason of any provision of this subchapter, at a rate in excess of the rate of basic pay for level V of the Executive Schedule.

Thus, § 5308 imposes on McCorkle and his class a ceiling on their pay equivalent to the salary for a level V executive, the lowest of five grades in the Executive Schedule.

The Federal Salary Act authorizes the President to recommend adjustments in executive pay, including level V, every four years. Title 2 U.S.C. § 359 provides that these recommendations become effective unless the House and Senate enact different pay rates or either house disapproves of the recommendations.[2] In March, 1974, the Senate rejected the

> (2) pay distinctions be maintained in keeping with work and performance distinctions;
>
> (3) Federal pay rates be comparable with private enterprise pay rates for the same levels of work; and
>
> (4) pay levels for the statutory pay systems be interrelated.
>
> (b) The pay rates of each statutory pay system shall be fixed and adjusted in accordance with the principles under subsection (a) of this section and the provisions of [section] . . . 5308 of this title.

[2] 2 U.S.C. § 359(1) provides in part:

> [A]ll or part (as the case may be) of the recommendations of the President transmitted to the Congress in the budget under section 358 of this title shall become effective at the beginning of the first pay period which begins after the thirtieth day following the transmittal of such recommendations in the budget; but only to the extent that, between the date of transmittal of such recommendations in the budget and the beginning of such first pay period—
>
> (A) there has not been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations,
>
> (B) neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendations, or
>
> (C) both.

President's recommendation for an increase in the pay rate for level V executives.[3] Because of the ceiling set by the Federal Pay Comparability Act, 5 U.S.C. § 5308, and the Senate disapproval of the President's proposal, the top salaries for General Schedule employees remained at the rate previously set for level V. It is this pay freeze that McCorkle attacks as discriminatory.

II.

McCorkle contends that § 5308 denies him equal protection of the law because the ceiling it imposes on some General Schedule pay rates is not rationally related to a legitimate legislative purpose. He claims that all General Schedule employees, including those in grates 15 to 18, are entitled to salaries determined by the principles in § 5301. He asserts that § 5308 invidiously discriminates between employees whose salaries have been increased annually because they are less than the level V ceiling and those whose salaries are frozen by the ceiling.

Since the pay system does not touch any fundamental right nor create a suspect classification, the statute complies with the equal protection component of the due process clause, as long as it rationally furthers legitimate, governmental purposes. *Cf.* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976); *see* Buckley v. Valeo, 424 U.S. 1, 93 (1976). To assess the rationality of the classification of employees created by the statute, we must examine its purpose in the context of the federal pay system for both General Schedule and Executive Schedule employees.

In establishing the policy governing the General and Executive Schedules, Congress intended that pay be com-

[3] S. Res. 293, 93rd Cong., 2d Sess., 120 Cong. Rec. 5508 (1974).

mensurate with responsibility and that the relationship between salary schedules be appropriate. If General Schedule salaries exceeded compensation for federal executives, some employees would earn more money than others with greater responsibility. Also, some General Schedule employees would earn more than their bosses. Consequently, the ceiling on General Schedule salaries rationally furthers the congressional purpose of establishing a logical relationship between pay and responsibility. *Cf.* Dandridge v. Wiliams, 397 U.S. 471 (1970).

Moreover, Congress determined that the pay rates for top level and lower level General Schedule employees involve different considerations. Explaining a similar ceiling on General Schedule salaries imposed by the Federal Salary Act of 1967, the Senate Report stated:

> There is an unrealistic ceiling on Federal salaries at the highest levels which reflects the national sentiment that officers with great responsibility in the Government are bound as good citizens to make some personal financial sacrifice for their country and their Government while serving in appointive positions. But below that high level, career employees must be paid as well as if they worked in private enterprise. There is a direct and proved relationship between adequate pay and the willingness of any employee anywhere to do his best. The Government would be saving nothing and losing much if it did not recognize and follow this principle of equal pay for equal work for Federal employees.[4]

As Congress has subsequently acknowledged, the pay structure established by the Federal Pay Comparability Act

[4] S. Rep. No. 801, 90th Cong., 1st Sess. 24, *reprinted in* [1967] U.S. Code Cong. & Ad. News 2258, 2281.

does not entirely meet its objectives, because the compression of salaries at the General Schedule ceiling affects career incentive and morale.[5] The fifth amendment, however, does not require Congress to develop a perfect pay system. The ceiling imposed by § 5308 bears a reasonable relationship to Congress's objective of balancing fiscal responsibility with employee needs. Since it justifiably furthers legitimate purposes identified by Congress, § 5308 does not deny McCorkle and his fellow employees equal protection of the law. *Cf.* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976); Wisconsin National Organization for Women v. Wisconsin, 417 F.Supp. 978, 986 (W.D. Wis. 1976); Bruce v. Scearce, 390 F.Supp. 297, 300-01 (E.D. Mo.), *aff'd* 521 F.2d 796 (8th Cir. 1975).

III.

McCorkle also contends that the one-house veto of the President's recommendations for Executive Schedule salaries as provided in the Federal Salary Act, 2 U.S.C. § 359(1)(B),[6] is an unconstitutional delegation of legislative authority.[7] He claims that if the Senate had not acted unconstitutionally to disapprove the President's recommendations, the new rates of executive pay would have gone into effect automatically. This would have raised the level V ceiling and consequently increased his own pay.

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[5] S. Rep. No. 94-333, 94th Cong., 1st Sess. 4-8, *reprinted in* [1975] U.S. Code Cong. & Ad. News, 845, 848-852.

[6] *See supra* note 2.

[7] In Atkins v. United States, Nos. 41-76, 132-76, 357-76 (Ct. Cl., May 18, 1977), the court upheld the constitutionality of § 359(1)(B). The dissenting opinion maintained that this part of the statute was unconstitutional and severable from the rest of the Act.

The difficulty with McCorkle's position is his assumption that Congress would have enacted the Federal Salary Act without the provision for the legislative veto set forth in § 359(1)(B). This raises the question of the separability of this provision from the Act. Unless it is separable, McCorkle cannot recover damages even if it is, as he contends, unconstitutional. Lacking separability, the provisions for the President's recommendations would be deemed inoperative. 2 C. D. Sands, Statutes and Statutory Construction, §§ 44.03, 44.06 (4th ed. 1973). The canons of constitutional litigation dictate that we initially consider the statutory issue of separability before we turn to the question of constitutionality. *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring).

In Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932), the Court stated that the separability of a statute should be determined by the following standard:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

When the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent. *See* Davis v. Wallace, 257 U.S. 478, 484 (1922); 2 C. D. Sands, Statutes and Statutory Construction, § 44.13 (4th ed. 1973).

Applying these rules of statutory construction to the Federal Salary Act of 1967, we conclude that the President's power to fix salaries is not separable from the restriction on this power embodied in the one-house veto. The Act pro-

vides that the President's recommendations for Executive Schedule salaries shall be effective unless (A) Congress enacts a statute which establishes different pay rates, or (B) either house disapproves of the recommendations.[8] Thus, the effectiveness of the President's recommendations depends on the acquiescence of both houses. The legislative history demonstrates that Congress would not have granted the President the power to set congressional, executive, and judicial salaries without this restriction.

The proposal for establishing salaries by presidential recommendation was vigorously debated by Congress because some members feared that it delegated to the President excessive authority over federal pay. In the House, Representative Gross offered an amendment to strike the provisions authorizing the President to make potentially binding recommendations. Representative Udall, the House floor manager, defended the bill by repeatedly emphasizing that Congress could veto the President's suggestions. He said that if the President's recommendation were arbitrary, "it would be vetoed by this House with 5 minutes of debate. . . ." 113 Cong. Rec. 28643 (1967).

The bill passed the House with the provision that the President's recommendations would become effective unless Congress disapproved of them or enacted pay legislation. The Senate, however, refused to authorize the President "to establish, affirmatively or negatively, the salaries of the Members of Congress" on the ground that allowing the President's recommendations to take effect in the manner provided by the House abdicated Congress's constitutional responsibility.[9] Following a conference, the Senate passed

[8] *See supra* note 2.

[9] S. Rep. No. 801, 90th Cong., 1st Sess. 25, *reprinted in* [1967] U.S. Code Cong. & Ad. News 2258, 2282.

a compromise bill which essentially followed the House version. It acted only after considering assurances that either House could veto the President's recommendations. Senator Monroney, the Senate floor manager, explained:

> If the [Senate] does not like [the salaries recommended by the President], a majority of one in either body can veto that plan and Congress can fix those salaries legislatively. We have not surrendered any power. We have the right to exercise the power whenever such plan does not meet the consensus of the majority of one in either house.
>
> * * *
>
> . . . Either House, by a majority of one, can reject or modify the plan. So the power rests with the congressional branch. 113 Cong. Rec. 36108 (1967).

Voiding the one-house veto as unconstitutional while leaving presidential authority intact would increase the President's power over salaries far beyond the intention of Congress. We are satisfied that the legislative history establishes that Congress would not have delegated authority to the President to establish salaries without the provision for the one-house veto. Thus, § 359(1)(B) creating the veto is inseparable from those parts of the statute that empower the President to make potentially binding recommendations. If the veto were unconstitutional, as McCorkle contends, the provisions for the President's recommendations to become effective could not stand in isolation. Accordingly, McCorkle would not be entitled to damages based on these recommendations.

IV.

We also conclude that McCorkle is not entitled to a judgment declaring whether § 359(1)(B) is constitutional. An important question of public law should not be resolved by a declaratory judgment if that judgment would be futile. The court should be able to see "what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." Public Service Commission v. Wycoff Co., 344 U.S. 237, 244 (1952); *see* E. Borchard, Declaratory Judgments 299 (2d ed. 1941); C. Wright & A. Miller, Federal Practice and Procedure, §§ 2759, 2763 (1973).

As explained in Part III, McCorkle could not recover damages even if he prevailed on his contention that § 359(1)(B) is unconstitutional. Moreover, while this appeal was pending, Congress amended § 359(1)(B) to provide that the President's recommendations shall become effective only if both houses of Congress approve.[10] Because the statute no longer provides for a one-house veto, a declaratory judgment concerning the constitutionality of this legislative check on executive action would not affect the procedure used to determine McCorkle's future pay. We therefore conclude that a declaratory judgment should be denied because it would not serve a useful purpose in settling the controversy.

Affirmed.

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[10] Act of April 12, 1977, Pub. L. No. 95-19, § 401, 91 Stat. 39.